In the Supreme Court of the United States

OCTOBER TERM, 1952,

No. 244.

LEONA ANDERSON MAY,
Appellant,

vs.

OWEN ANDERSON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF APPELLANT.

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TABLE OF CONTENTS.

Appellee's Departures from Record 1

Argument in Reply 7

This Court's Jurisdiction 7

The Issue 7

Another Issue? 7

First Question 9

Second Question 9

The Question Appellee's Contentions Raise 11

Appellee Anderson's One Argument 12

Reply to Appellee's Argument 13

Second Question, Conclusion 18

Third Question 19

TABLE OF AUTHORITIES.

Cases.

Abbott v. Abbott (1947), 304 Ky. 167, 200 S. W. 2d 283 26

Adam v. Saenger (1938), 303 U. S. 59, 82 L. ed. 649, 58 S. Ct. 454 8

Atchison, Topeka & Santa Fe Ry. Co. v. Sowers (1909), 213 U. S. 55, 53 L. ed. 695, 29 S. Ct. 397 8

Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252 5

Boardman v. Boardman (1948), 135 Conn. 124, 62 A. 2d 521, 13 A. L. R. 2d 295 26

Callahan v. Callahan (1944), 296 Ky. 444, 177 S. W. 2d 565 26

Cheever v. Wilson (1870), 9 Wall. 108, 19 L. ed. 604 23

Davis v. Davis (1938), 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, 118 A. L. R. 1518 ..... 3, 8

D'Arcy v. Ketchum (1850), 11 How. 165, 13 L. ed. 648 8

Fauntleroy v. Lum (1908), 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641 8

Francis, In re (1947), 75 N. E. 2d 700, 49 Ohio Law Abs. 427 26

Glass v. Glass (1927), 260 Mass. 562, 157 N. E. 621, 53 A. L. R. 1157 ..... 24, 25

Hanson v. Hanson (1948), 150 Neb. 337, 34 N. W. 2d 388 26-27

Harding v. Alden (1832), 9 Maine (Greenl.) 140 23

Lanning v. Gregory (1907), 100 Tex. 587, 99 S. W. 542, 10 L. R. A. n.s. 690, 123 Am. St. Rep. 809 25

McDonald v. Mabee (1917), 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343 4-5

Milliken v. Meyer (1940), 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, 132 A. L. R. 1357 ..... 4, 5, 8

Oxley v. Oxley (1946), 81 App. D. C. 346, 159 F. 2d 10 26

Pennoyer v. Neff (1878), 95 U. S. 714, 24 L. ed. 565 ..... 13, 14, 16, 17

Signs v. Signs (1952), 156 Ohio St. 566, 103 N. E. 2d 743 24

Tolen v. Tolen (1831), 2 Blackf. (Ind.) 407 23

Wear v. Wear (1930), 130 Kan. 205, 285 P. 606, 72 A. L. R. 425 25

White v. White (1913), 77 N. H. 26, 86 A. 353 26

Wicks v. Cox (1948), 146 Tex. 489, 208 S. W. 2d 876, 4 A. L. R. 2d 1 25-26

Worden v. Worden (1949), 148 Tex. 356, 224 S. W. 2d 187 27

Worrell v. Worrell, (1939), 174 Va. 11, 4 S. E. 2d 343 23-24

Yarborough v. Yarborough (1933), 290 U. S. 202, 78 L. ed. 269, 54 S. Ct. 181, 90 A. L. R. 924 24

Text.

Restatement of Conflicts, § 119 ..... 15, 16

Constitution.

Constitution of the United States:

Article IV, § 1 ..... 9, 11

Fifth Amendment 11, 21

Fourteenth Amendment 11, 19, 20, 21, 22, 23, 27

Statutes.

Ohio General Code, § 7996 19

28 U. S. C. A. § 1257(2) 7

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REPLY BRIEF OF APPELLANT.

Appellee's Departures from Record.

Appellee Anderson's brief has made us sharply aware of two reasons not often mentioned why it is unfair for a lawyer to depart from the record in respects prejudicial to the other side:

The first is that it makes his opponents expand their brief, with the increase in printing costs for their client or clients which that entails, to the extent necessary to deal with such departures.

The second is that it forces on his opponents a distasteful choice—which is really no choice—between apparent discourtesy to him and being unfaithful to the interest they represent.

The only part of the record in the Wisconsin divorce case that was introduced in evidence in this case was its decree (R. 6, 90). The decree does not state, and, since the matter was not pertinent to the issue in the trial

court and was not inquired into, we do not know, the ground or grounds on which the divorce was asked for, or on which it was granted.

On page 8 of appellee Anderson's brief, in note 13, he states that a paper bearing date of January 2, 1947 and purporting to be a letter from the appellant, Mrs. May, was introduced in evidence in the Wisconsin case. He says the paper stated, "I don't intend to take the kids from you. You can have them." And that, after admitting "her guilt" (?), it further stated, "You can send me whatever you want me to have. If it's nothing, it's more than I deserve."

Several things are obvious, to wit: (1) The purported letter is *not* in the record in *this* case. (2) It is not relevant to any *issue* in this case. Therefore, (3) the only possible motive that can have inspired its importation here from *outside* the record is a hope that it may arouse prejudicial feeling against Mrs. May, to appellee Anderson's advantage.

It is likewise obvious that it is impossible for us, in Ohio, to have any knowledge of what went on in an *ex parte* proceeding in Wisconsin in which neither we nor our client appeared. It is perfectly apparent to us, however, that the existence of any such letter would give the lie to appellee Anderson's claim in the courts below, and apparently here also (see page 2 of his brief, note 1), that at the very time the purported letter is dated, he was demanding the return of the children and she was refusing to return them (see facts stated on page 15 of appellant's brief, to which statement appellee Anderson refers in the note cited above).

Courtesy to opposing counsel of course requires us to assume that the files of the Wisconsin case contain a paper purporting to be such a letter. After interviewing

our client, however, we categorically state on her authority that, if so, it is a forgery. She wrote no such letter.

In an equally flagrant digression from the record on page 9 of his brief, appellee Anderson *contradicts* the record when he says:

> "Why did not appellant oppose jurisdiction of the Wisconsin Court to determine custody of the children by appearing specially[1] to deny jurisdiction when she was apprised of such proceedings? * * * [A]ppellant had *ample opportunity*[2] to appear specially or even to present evidence of her fitness as a mother."

The facts that follow have been stated previously (pages 15 and 16 of appellant's brief) and appellee Anderson says (page 2 of his brief, note 1) that they are "not in dispute":

When appellant was apprised in Ohio of the proceedings in Wisconsin, she was without money (R. 16, 19). It is true that, alone, this fact would not necessarily have made her return to Wisconsin any total impossibility. Perhaps, under other circumstances, she could and would have risked hitch-hiking back to Wisconsin.

But she had the children with her in Ohio (R. 22). Their ages were then eight, five and eighteen months (R. 14). One of them was sick (R. 16). It was January or, at the latest, one of the first days of February, 1947 (R. 12, 15, 22).

Successfully to beg rides for herself and the three children from Ohio to Wisconsin at such a time and under

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[1] *Davis v. Davis* (1938), 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, 118 A. L. R. 1518, which appellee cites on page 8 of his brief, illustrates rather graphically both the dubious propriety of special appearances in divorce cases and their hazards.

[2] In this brief, as in appellant's former brief, all emphasis inside quotations has been supplied by appellant's counsel unless the contrary is expressly noted.

such circumstances *was* an impossibility. Had she tried, the spectacle presented by the exposure in mid-winter to the hazards of such a journey of three infant children, one of them ill, would have lodged her in custody long before she reached Wisconsin. Indeed, after the able counsel then advising her had flatly told her to stay in Ohio (R. 15), it *would* have been criminal misconduct, morally as well as technically.

Thus the fact—the *record* fact—is that Mrs. May did *not* have "ample opportunity" to appear in the Wisconsin case, either "specially" or otherwise. The *fact* is that she did *not* have a chance "to present evidence of her fitness as a mother." The fact, as appellee Anderson well knows, is that she had no opportunity whatever to be heard on any question whatever in the Wisconsin case. The fact, indeed, may well be that her chance of ever having "her fitness as a mother" tried on its merits by *any* court depends on her prevailing in this Court and securing here a declaration that the Wisconsin court's purported disposition of her children is the nullity we contend it to be.

The foregoing effort to distort Mrs. May's inability to return to Wisconsin into a callous indifference to her children's fate, would have been sufficiently inexcusable if it were claimed that she was then a domiciled citizen of Wisconsin with some duty to respond to its summons, as was Meyer a domiciled citizen of Wyoming with a duty to respond to its summons in *Milliken v. Meyer* (1940), 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, 132 A. L. R. 1357.

Although it is not strictly material here, since Mrs. May was admittedly domiciled in Ohio before the Wisconsin case was started, we nevertheless want to make it perfectly plain that we do not concede that the service on Mrs. May in Ohio was such that it was capable, under any circumstances, of giving the Wisconsin court jurisdiction of her person. As *McDonald v. Mabee*

(Continued on following page)

But when it is elsewhere openly admitted that her home had become Ohio (page 10 of appellee Anderson's brief)—and it is thus necessarily conceded that Wisconsin had no right at all to summon her—the distortion seems really quite indefensible.

Other similar departures from the record are scattered through appellee Anderson's brief. Examples are the intimations on page 10 that this record shows that "there was no neglect of parental duty on the part of the father" (*i.e.*, appellee Anderson),—with a distinct accompanying implication that the record shows there *was* a "neglect of parental duty" by Mrs. May—and, on page 13, that this is a case

> "where children have been taken out of the state for the purpose of establishing a new domicil to defeat justice."

(Continued from preceding page)

(1917), 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343, *Blackmer v. United States*, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252, and *Milliken v. Meyer*, above, all make clear, a State's obtaining jurisdiction of the person of one of its citizens who is outside its territory depends, not at all on power, but on *duty*—a duty imposed on the absent citizen by his allegiance to the State from which he is absent, to return in obedience to its summons. And *McDonald v. Mabee* makes it very plain that the summons, and the service thereof, if they are to be valid, must be of such character that it is realistic to say that they *do* place him under a duty to appear in response to the summons. Where, as here, a summons is served hundreds of miles beyond the border of the State issuing it, and where the person served is then destitute and no tender of traveling expenses is made, how realistic is it to hold that State has succeeded in imposing a duty to obey the summons on the person served? When the performance of the supposed duty to that State is impossible without its help, and when that help is not offered, is it not merely a denial of one of the first essentials of due process—namely, a fair chance to be heard—to hold that such a duty has been imposed and jurisdiction of the absent citizen's person obtained? In *Blackmer v. United States*, a tender of traveling expenses *was* made, and if the same thing was not true in *Milliken v. Meyer*, Meyer raised no objection to it.

To the extent the record in this case shows anything in either respect, it of course *contradicts* each of the foregoing.

To pursue the matter of such digressions further, however, would be to join appellee Anderson in his effort to divert attention from the issue in this case.

The one further departure from the record now mentioned, is mentioned because the effect is to get us back to the issue. On page 16 of his brief, appellee Anderson says:

> "It seems that Counsel for appellant overlooks the fact that the Wisconsin Court * * * took testimony relative to the fitness of the individual parent prior to the making of its order * * *."

The issue in this case is of course whether the Wisconsin court had jurisdiction. The attorneys for Mrs. May have no means of knowing, and it is in this case of no interest, whether the Wisconsin court received evidence or not. If it did *not* have jurisdiction, its purported custody order is *void*, even though it listened to testimony for a week. If it *did* have jurisdiction, its purported award is *valid*, even though the "evidence" supporting it commenced and ended with counsel's comments as the decree was being tendered for the court's signature.

ARGUMENT IN REPLY.

In order to clarify in our own minds appellee Anderson's position on the merits of this case, we shall take up in their order the main points in the case one by one and, under each, discuss what he has said in connection with that point:

This Court's Jurisdiction.

As in his contra-jurisdictional statement, appellee Anderson concedes that all technical jurisdictional requirements imposed by 28 U. S. C., §1257(2) are satisfied, by addressing himself, save for the non-jurisdictional digressions just noted, solely to the merits.

The Issue.

At the outset of his brief (page 3), appellee Anderson grants that we have stated the issue correctly, saying:

> "The one basic question involved is the validity of the Waukesha, Wisconsin County Court decree awarding custody of the children of the parties to the appellee and whether said decree is entitled to 'full faith and credit' [and] enforcement in the State of Ohio."

Another Issue?

Later, however, in a passage that occupies most of pages 14 and 15 of his brief and cites three of the five cases he has contributed to the authority cited in this case, he says:

> "that if the judgment on its face appears to be a 'record of a court of general jurisdiction', * * * jurisdiction over the cause and the parties is to be presumed unless disproved by *extrinsic evidence* or by the record itself".

and that, if the court's jurisdiction is *not* rebutted by the record or by extrinsic evidence, then, no matter how erroneous the judgment may be, it is entitled to "full faith and credit."

In support of these incontestable propositions, appellee Anderson, in addition to *Milliken v. Meyer* (1940), 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, 132 A. L. R. 1357, already several times cited by appellant, also cites the following: *Fauntleroy v. Lum* (1908), 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641. *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers* (1909), 213 U. S. 55, 53 L. ed. 695, 29 S. Ct. 397.[1] *Adam v. Saenger* (1938), 303 U. S. 59, 62, 82 L. ed. 649, 58 S. Ct. 454.

And earlier, on page 8 of his brief, appellee Anderson cites *Davis v. Davis* (1938), 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, 118 A. L. R. 1518, one of the other two cases he has contributed, for the proposition "that full faith and credit must be given in each state to judicial proceedings of other states and applies to all courts Federal as well as State."

This expenditure of authority on points that appellant's brief takes for granted—certainly we nowhere dispute them—makes us wonder whether appellee Anderson is seeking to introduce *another* issue into the case. If so, what?

Is appellee Anderson claiming, by any chance, that the agreed statement of facts, or possibly the testimony in the trial court, is not properly in the record in this case, and that there is therefore no "extrinsic evidence" prop-

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[1] *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, above, extends the rule of *D'Arcy v. Ketchum* (1850), 11 How. 165, 13 L. ed. 648, to statutes. It holds that a purported statute which it was not within the power of a territorial legislature (New Mexico) to enact, is *not* entitled to "full faith and credit."

erly in *this* record to rebut the "presumption of jurisdiction" in Wisconsin?

The stipulation or agreed statement of facts was duly filed in the case and appears both in the common law record (R. 130) and in the bill of exceptions (R. 6, 21-3). The testimony and exhibits in the trial court are all in the bill of exceptions (R. 1 to 90—see especially R. 86-7 and R. 88), and the transcript of which the common law record and the bill of exceptions both form a part is duly authenticated by the Clerk of the Supreme Court of Ohio under the seal of that Court.

Thus, as far as we know, there is no such issue in this case, and the issue that the record does raise—the *sole* issue it raises—is still the issue with which we started in the trial court, to wit, the validity of the purported Wisconsin custody award and its consequent title, or lack of title, to "full faith and credit" under Article IV, §1 of the Constitution of the United States.

First Question.

Page 8 of appellee Anderson's brief tells us it is "irrelevant" that the service of the Wisconsin summons on Mrs. May in Ohio did not give the Wisconsin court jurisdiction of her person.

As the only thing we are interested in establishing in connection with this point is that the Wisconsin court did *lack* jurisdiction of Mrs. May's person, and as this is conceded, we turn to the next question.

Second Question.

Appellee Anderson not only refuses to meet the second question in this case; he refuses even to admit that it exists (see pages 2, 3 and 4 of his brief). Yet his own contentions squarely raise the question:

He contends (page 4 of his brief), and each of the courts below has of course held (see page 28 of appellant's brief, note 28), that the Wisconsin court had jurisdiction to dispose of these children *before* they left Wisconsin—i.e., *before* any case or proceeding was commenced in any Wisconsin court—and that the Wisconsin court did not "lose" its jurisdiction by their departure for Ohio.

The contention that the Wisconsin court already had jurisdiction of the children before the Wisconsin case was started, was forced on appellee Anderson by the facts: As he concedes (page 10 of his brief), the children were not named parties to the Wisconsin case or served in it. They were not in Wisconsin, but were throughout the case living with their mother in Ohio. The Wisconsin court, as we have just seen, did not have jurisdiction of their mother's person.

As a court must first *acquire* jurisdiction before it can "lose" it, the foregoing contention merely raises the question: *How* did the Wisconsin court *acquire* this alleged jurisdiction to dispose of these children that appellee says it did not "lose" when the children left?

The courts below hold (see second parenthetical reference above), and appellee Anderson contends throughout his brief, that the Wisconsin court *acquired* jurisdiction to dispose of these children by virtue of their "domicil" in Wisconsin. Necessarily, therefore, since the children were *born* domiciled in Wisconsin, the contention is that the Wisconsin court, and indeed all Wisconsin courts legally capable of receiving such jurisdiction, acquired jurisdiction to dispose of these children at their *birth*.

Thus, despite appellee Anderson's refusal to admit that the question exists, his own contentions here do flatly raise the following question:

THE QUESTION APPELLEE'S CONTENTIONS RAISE.

Can it be held, compatibly with the principles of public law implicit in Article IV, §1 of the Federal Constitution that are protected against Federal violation by the 5th Amendment and against State violation by §1 of the 14th Amendment, that a United States citizen's domicil and consequent citizenship in a State, and the mutual obligation of *allegiance* between the citizen and the State that results,[5] give the courts of that State jurisdiction, without serving him with process or even giving him notice, to adjudicate him to be a minor or other incompetent[6] and then commit him to custody?

[5] On page 8 of his brief, appellee Anderson says: "We are here concerned over jurisdiction in *divorce* matters only." And on page 10, he says: "Jurisdiction over the children of the parties lies in the relationship of marriage and divorce" (*sic*). In truth, of course, we are in this case no more concerned with the conceptions of the *canon* law that govern "*jurisdiction* in divorce" and the jurisdictional effect of "domicil" both in divorce cases and in the probate of decedents' wills and the administration of decedents' estates, than we are with the jurisdictional concepts, if any, that exist in the tribal law of the Bantu. Fortunately for the liberty of the citizen, the jurisdiction to adjudicate persons to be minors or otherwise incompetent and then commit them to custody, was never within the competence of the ecclesiastical courts. The jurisdiction has always been the exclusive property of the common law and chancery, and it is with the principles of jurisdiction accepted by the common law and chancery, solely, that we are here concerned. These principles attribute to "domicil," as such, no jurisdictional significance whatever. Such jurisdictional effect as they permit domicil is indirect, and is purely incidental to the operation of the rule that, if the sovereign lets a person make his home within the sovereign's territory and the person does so, the mutual obligation of *allegiance* arises between them. The existence of a bond of allegiance of course *does* have jurisdictional significance, although none, we believe we have shown in appellant's brief, that could have given Wisconsin the slightest power to dispose of the children in this case.

[6] On page 10 of his brief, appellee Anderson objects to our defining the jurisdiction with which we are here concerned as the jurisdiction to adjudicate alleged "minors and incompetents" to be such and then commit them to custody. Since he gives no grounds for his objection, we shall not elaborate the reasons

(Continued on following page)

Appellee Anderson, although he refuses to admit openly that the foregoing question exists, has been unable to resist taking various pot shots at our statement of it, thus showing that he is in fact very well aware of its existence indeed, and that his trouble is that he cannot think of any plausible answer to it but the word "No." His pot shots have been dealt with in the margin in the footnotes appended to the foregoing statement of the question.

Appellee Anderson's One Argument.

He further betrays his knowledge that the question exists by half-heartedly slipping into his brief this argument, namely, that the "status" of the children is a *res*, of which the children's original domicil in Wisconsin somehow gave that State "jurisdiction," and that the Wisconsin court's purported disposition of these children was merely an exercise of Wisconsin's "jurisdiction" of their "status."[7]

(Continued from preceding page)

that led us to accept the foregoing definition as right, but shall merely repeat what was said in note 8 on page 5 of appellant's brief, namely: The jurisdiction to adjudicate persons to be minors or otherwise incompetent and then commit them to custody is, by all authorities we have encountered, treated and regarded as an integral whole, a *single* jurisdiction, with respect both to the foundations of the jurisdiction and the requisites for jurisdiction. See, for example, the sections of the *Restatement of Conflicts* collected on pages 44-5 of appellant's brief.

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[7] The summary of appellee Anderson's intended argument on the first index page of his brief reads: "a. Domicil of Children in Wisconsin. b. Jurisdiction of Wisconsin Court to determine custody of children. (1) Jurisdiction of *res*."

To find out what *res* was being talked about required a certain amount of detective work. However, on page 9 of his brief, appellee Anderson says:

> "In the case at bar, the Wisconsin court had jurisdiction of the *res*, or subject matter, by reason of the domicil of the children in Wisconsin * * *."

(Continued on following page)

We have combed appellee Anderson's brief. The foregoing is the only thing at all resembling an effort to answer appellant's argument on the above question that we have been able to discover. Apparently, therefore, it is our duty to reply to it.

Reply to Appellee's Argument.

His argument, as is perhaps obvious without our comments, is an almost classical example of an argument that involves words of more than one meaning and depends for its success on sliding without detection during the course of the argument from one set of meanings to another.

The words involved are "status" and "jurisdiction," and by taking as a text the following passage from this Court's opinion in *Pennoyer v. Neff*,[*] a passage that contains both words, we shall be able to follow perfectly the course of appellee Anderson's argument and the shifts in word meanings on which it rests:

> "One of these principles [*i.e.*, the 'two well established principles of public law' this Court has just said it

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(Continued from preceding page)

This of course still left the problem of the identity of the *res* that was supposed to constitute the "subject matter." On page 16 of his brief, however, appellee Anderson puts a question that clears this point up too, namely:

> "* * * why should a minor have to be served with process to adjudicate his or her *status* * * *"?

(The theory underlying appellee Anderson's question, apparently, is that children, so far as they themselves are concerned, are like livestock, without rights that the law need respect. So far as their *parents* are concerned, the theory would seem to be that the children are *less* than livestock. Since *Pennoyer v. Neff*, no court would dare purport to dispose of livestock without having either *possession* of the animals or else jurisdiction of their owner's *person*.)

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[*] 95 U. S. 714, 24 L. ed. 565, 568.

> relies on in *Penncyer v. Neff*] is, that every State possesses *exclusive jurisdiction* and sovereignty over *persons* and *property* within its territory. As a consequence, every State has the power to determine for itself the civil *status and capacities* of its *inhabitants*; to prescribe the subjects on which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligation enforced; and also to regulate the manner and conditions upon which *property* situated within such territory, may be acquired, enjoyed and *transferred*. * * *"

As will be observed, the passage does say that a State has "jurisdiction" to determine for itself the "status" of the people domiciled in it. Thus, what it says does bear a certain superficial resemblance to what appellee Anderson argues.

Let us look, however, at the meanings in which, in the passage quoted, this Court actually uses the words in question:

The passage uses the word "status" in the ordinary meaning the word has in both the speech of the public (see any edition of *Webster's*) and common legal parlance (see *Black's* and *Bouvier's* law dictionaries), to wit, the "state or condition of a person" in the world—his legal position vis-a-vis the rest of the community. The "state or condition" of a "free and legal man," who has the full complement of legal capacities in dealing with the rest of the world that the common law allows anyone, is of course the norm. Every other status, such as that of a prisoner, an infant, a lunatic or, formerly, a villein (or married woman), is a "state or condition" of *lacking* various of the legal capacities that belong to the full complement just mentioned.

Since, in this sense, the "status" of an infant or lunatic consists of an *absence* of normal legal capacities, it is apparent that manufacturing a *res* out of it would be a reasonably perfect illustration of making something out of nothing. Possibly the activity might provide a product suitable for the man who is said to to sell holes for doughnuts to add to his line.

Respecting the word "jurisdiction," the Court uses it in the foregoing passage in the sense of a State's authority to have *laws* to which persons who inhabit, and things that are within, its territory are subject. The message of the passage, indeed, is simply that a State does have "jurisdiction" to have such *laws*.

Turning now from the meanings in which this Court used the words "status" and "jurisdiction" in the above passage to the meanings to which appellee Anderson has shifted, he shifts in the case of "status" to a meaning the writers on conflict of laws have quite arbitrarily (so far at least as the normal usages of the English language and the common law are concerned) assigned to it—a meaning the *Restatement of Conflicts* puts in these words:

> "§ 119. STATUS DEFINED. In the Restatement of this subject, a 'status' means a legal *personal relationship*, not temporary in nature nor terminable at the mere will of the parties, with which third persons and the State are concerned."

From other parts of the *Restatement*, which talk of the "status" of guardian and ward, of parent and child, of husband and wife, etc., it is evident that it is *domestic* relationships with which the above definition is especially concerned. (Apparently, a child whose mother dies in

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[9] In the normal sense of the word "status," a husband has never had any abnormal status. If they were free, sane and 21, husbands and bachelors alike, and for most purposes a *femme sole* as well, were equally "free and legal men."

childbirth and whose father was dead before he was born has no *Restatement* "status." The same thing would be true of a lunatic for whom no guardian or custodian has been appointed. No "personal relationship," no "status"!)

By this shift, as will be noted, appellee Anderson has provided himself with a *res*, or rather several of them, namely, the "legal personal relationships" between each of the children and appellee Anderson and each of the children and Mrs. May. (We have of course already shown on pages 25 to 27 of Mrs. May's brief that, whatever jurisdiction the Wisconsin court might have acquired over the "personal relationship" between appellee Anderson and each of the children by giving the children notice—which is something it did not do—it was entirely *without* power to acquire jurisdiction over the "personal relationships" between Mrs. May and her children. They were all *in Ohio*.)

The meaning of "jurisdiction" to which appellee Anderson shifts is of course a *court's* jurisdiction to hear and determine questions in litigation before it.

Thus, out of this Court's statement in *Pennoyer v. Neff* and other cases that a *State* has "jurisdiction" to determine the "status" of its inhabitants, appellee Anderson, by means of the foregoing shifts in the meaning of those words, extracts the proposition that a citizen's bare domicil and consequent citizenship in a State confer on the *courts* of that State—with *no* need to bring the citizen before any of those courts by process—full jurisdiction to determine and alter his "legal personal relationships" (or "statuses") as it thinks proper, and, as part of the process of doing so (although this involves a series of rapid shuttlings back and forth between the normal meaning of "status" and the artificial meaning attached to it by the conflicts writers), to adjudicate him to be a minor or lunatic and commit him to custody if it sees fit.

From this Court's accompanying statement that a State has "jurisdiction" over all "property" in its territory, and over the manner in which such property may be "transferred," it would, by like reasoning, be possible to extract the proposition that the State's courts are all constantly vested, without any need to seize the property by their process, with "jurisdiction" to transfer all the *property* in the State to whomever they please.

Needless to say, *Pennoyer v. Neff* stands for precisely the contrary propositions:

Pennoyer v. Neff explicitly holds that the bare presence of property in a State gives the *courts* of that State *no* jurisdiction whatever of that *property*. It explicitly holds that a court can have *no* jurisdiction to bind a man *personally* unless it first gets jurisdiction of his *person*. And, in the parallel this Court throughout draws between jurisdiction over persons and property, it is *implicit* that the bare presence of a *person* in a State, or the bare presence there of his habitation, his domicil, gives the courts of that State no more jurisdiction of his *body*, which is preeminently his property, or of his *liberty*, which is equally so, than does the bare presence of any other part of his property in the State give its courts jurisdiction of *that* property.

In short, the argument that, because the State of a person's domicil and consequent State citizenship has "jurisdiction" of his "status," its *courts* have jurisdiction, without serving him with process or even giving him notice, to adjudicate him to be a minor or lunatic and then commit him to custody, rests on nothing more substantial than the froth of a double play on words.

It might be added that the power of a State's legislature is no more extensive, in any respect pertinent here, than the power of its courts. A bill of pains and penalties

by which a legislature purported to single out a citizen and, by its fiat, declare him to be a minor or lunatic and order him committed to custody would, obviously, be void as a bill of attainder.

Second Question, Conclusion.

In both her jurisdictional statement and brief, Mrs. May has urged that there are two assumptions only on which any such jurisdiction as that asserted by the courts below on behalf of Wisconsin could be supported, namely:

> "*First*, that human beings are the chattel property of the State to which they are subject, and therefore that, whether they are inside that State or outside it, it has power, through its legislature or courts, to deliver a bill of sale or deed of gift of any of them to whomever it may select, which the courts of the place where he is will be bound to honor; or
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> "*Second*, the assumption of the Civil law, on which most if not all Western absolutisms have been built, that supreme and uncontrolled power exists in the emperor (or State) * * * 'because to him and in him the *people* have yielded up all their power and authority.' In short, said assumption is, the State, whether embodied in an emperor, a king or a legislature, holds an unlimited and irrevocable power of attorney from the 'people,' every one of them, and if the State chooses to sell a member of the people into slavery, or execute him, no wrong has been done him because it is his own act. Legally, *he* has sold *himself* into slavery, or committed suicide."

Appellee Anderson has been entirely unable to suggest any other assumption on which such a jurisdiction as that he here asserts for Wisconsin can rest.

If it is true that the foregoing assumptions are the only ones possible, then the real question in this case is a simple one: In the year 1947, at the time of the purported

proceedings in Wisconsin, did the people of the United States still retain the free status—the "liberty"—which, at the close of the next to the last decade of the 18th century, their predecessors, the then people of the United States, wrote and promulgated the Constitution of the United States to secure "to ourselves and our posterity"? Or, in some process of erosion, had it gradually weathered away?

Third Question.

It is necessary to review appellant's argument on the third question briefly in order to segregate the points appellee Anderson does not dispute from those on which he takes issue with us.

The third question arises because the courts below have held that § 7996, Ohio General Code, erects an invisible fence around Ohio through which a married woman cannot move the domicil of her children into Ohio without their father's consent, and that, since § 7996 thus fenced the domicil of these children *out* of *Ohio*, it stayed in Wisconsin. We contend that, as thus construed and applied, § 7996 is repugnant to each and every clause of § 1 of the 14th Amendment.

We urge first that, although a State of course still has power to prescribe rules regulating the place *within* the State which shall be regarded as the home of each of its citizens, the first sentence of the 14th Amendment has made the question of the *State* within which each citizen of the United States (be he man, woman or child) is domiciled—and of which he is therefore a State citizen, owing to it his *State* allegiance—a matter of *Federal* law exclusively, and that the question is thus necessarily a *Federal* question of which this Court is the final arbiter.

Appellee Anderson has not, on this contention, taken any issue with us, and, in view of the lucid and imperative language of the first sentence of the 14th Amendment, it is difficult to see how the proposition could be thought open to dispute.

We did not, in our argument in chief, in any way neglect the question of what the Federal law is, but there contend that, so far as a married woman's power to change her *own* domicil and consequent State allegiance and citizenship from State to State is concerned, she receives that power and privilege from the first sentence of the 14th Amendment directly, and that it is beyond the power of any State to abridge. We further contend that any effort by any State to abridge it would violate the due process and equal protection clauses as well.

On these propositions also, appellee Anderson takes no issue with us, conceding on page 10 of his brief that Mrs. May's own domicil did become Ohio when she went there with the children and decided to remain in Ohio to live.

Concerning the Federal law respecting a wife's power to change her *children's* domicil and consequent State allegiance and citizenship from one State to another, we contend in our argument in chief that, once it is granted that a married woman has the power to change her *own* home and State allegiance, it follows from the provisions of the 14th Amendment that she cannot lawfully be deprived of the liberty and power to make a home for her children with her: (1) To do so would plainly *abridge* the privilege conferred on her by the first sentence of the 14th Amendment freely to move her *own* home from one State to another. (2) There is no conceivable *rational* ground on which it can be held that the physical fact of being a female makes a mother *less* fit to make a home for her

children than is their father. Therefore any rule that purports to deny a mother the power to establish a home for her children without their father's consent, but at the same time allows him, without their mother's consent, to move the children's home wherever he pleases, is necessarily arbitrary and capricious. If any discrimination could be reasonable and rational, the rational discrimination would be the other way. Consequently, such a rule, if State, is repugnant to both the due process and equal protection clauses of the 14th Amendment, and a Federal rule of such purport would violate the 5th Amendment.

We do not find any place where appellee Anderson takes issue with the proposition numbered (1) in the preceding paragraph, or, indeed, that he anywhere takes issue with our contention under (2) that there is no rational ground on which it can be held that a mother, because she is a female, is less fit to make a home for her children than is their father.

He takes violent issue, however, with the *conclusion* respecting the Federal law to which these propositions necessarily lead, to wit, that the power of the husband and the wife to make a home for the children of their marriage is *equal*.

He contends that, arbitrary or not, capricious or not, it is "settled" by a "mass of authority" that the "mother, under the law, cannot establish the domicil of the children without the consent of the father," that "the children's domicil follows that of the father," that "to challenge this established concept is to challenge the very basic long established concepts of the law of our land," and therefore that taking from the wife the liberty and power to make a home for her children "does not deprive her of due process of law nor of equal protection of the law." She has, he contends, forfeited all interest in her children by

marrying their father, anything in the Constitution of the United States to the contrary notwithstanding, "for the the marital status brings with it obligations and privileges, benefits and detriments, disadvantages and compensations which are contracted upon when entering the marriage relationship." The maxim, "Husband and wife are one, and he is the one", was inadvertently omitted.

Since, as we have just seen, the first sentence of the 14th Amendment makes the question of the *State* in which a citizen of the United States is domiciled, and which is consequently the State of his citizenship and State allegiance, one of *Federal* law; and since the only power given Congress by the 14th Amendment is the power "to enforce" it, appellee Anderson would seem to be asking this Court to fasten upon the United States as a straightjacket, alterable only by constitutional amendment, the law of the 15th century respecting the condition of married women on which he relies.[10]

Perhaps if, at the time the 14th Amendment was adopted in 1868, the 15th century rules respecting the civil condition of married women had been in full force and vigor in the United States, this Court might feel helpless to hold anything except that the 14th Amendment had incorporated them by reference—although, even in that case, we should have argued with all the energy at our command that the 14th Amendment *could* not so operate, that its manifest purpose was to *free* persons from bond-

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[10] We specify the 15th century advisedly since, in earlier centuries, the condition of married women had been by no means so abased as, during the 14th and 15th centuries it became. *Holdsworth* (A History of English Law), 5th ed., iii, 523. In short, the condition of married women was a result, not of any application of legal principle, but, as the courts at all times freely admitted, of a recognition of custom—in our opinion "bad custom": that, had the courts admitted it to be such, the principles of the common law would have *forbade* them to recognize.

age, not in any case to rivet their shackles on them more tightly.

But the 15th century rules respecting the condition of married women were *not* in full force and vigor in the United States in the year 1868. They had never had any too friendly a reception on this side of the Atlantic, and, as previously pointed out (page 53 of appellant's brief), within two years of the adoption of the 14th Amendment, in *Cheever v. Wilson* (1870), 9 Wall. 108, 124, 19 L. ed. 604, 608, this Court *held:*

> "'It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well *settled* that it would be idle to discuss it."

The law did not become "settled" in two years, and *Cheever v. Wilson,* not appellee Anderson's reminiscences concerning the medieval rules on the subject, represents the law as it was understood at the time the 14th Amendment was adopted.[11]

The fact that, when the 14th Amendment was adopted, a married woman had already achieved the power to change her own domicil is, we urge, dispositive of the question that remains here, which is whether a married woman ought, as a matter of Federal law, to be held to have the same power as her husband to change her *children's* domicil!

The common law has never known any such thing as a "unity" or "identity" of husband and *child. Worrell v.*

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[11] As early as 1831 and 1832, in States as widely separated as Indiana and Maine, it was taken almost for granted that a married woman might have a domicil of her own. *Tolen v. Tolen* (1831), 2 Blackf. (Ind.) 407. *Harding v. Alden* (1832), 9 Maine (Greenl.) 140. As is evident from the latter case, the law was regarded as thus settled in Rhode Island in 1828. For the Ohio cases, see page 52 of appellant's brief.

Worrell (1939), 174 Va. 11, 4 S. E. 2d 343, 346. *Signs v. Signs* (1952), 156 Ohio St. 566, 570, 574, 103 N. E. 2d 743. (And see authorities collected in each case.) The inability of a wife to change her child's domicil was, like her inability to change her own domicil or to own chattels in her own right, merely one of the incidents of the complete merger, for civil purposes, of her legal personality into her husband's. The instant that merger was broken to the extent necessary to let a wife have a domicil, a home, for herself, separate from her husband's (as *Cheever v. Wilson* and the cases referred to in the margin demonstrate it had been when the 14th Amendment was adopted), it was necessarily broken to the extent necessary to let her make that home the home of her children also.

Let us now look at the "mass of authority" by which appellee Anderson says his position is supported:

The first case he cites, *Glass v. Glass* (1927), 260 Mass. 562, 157 N. E. 621, 53 A. L. R. 1157, involved the effect on a child's domicil of a custody award to the husband made in a New Jersey divorce case brought at a time when the husband, wife and child were all domiciled in New Jersey and in which each prayed for divorce and custody of the child. The wife moved to Massachusetts i the middle of the case, taking the child with her, but remained an active litigant throughout. In accord with the uniform rule that the domicil of a child is that of the parent to whom its custody has been *validly* awarded, *Glass v. Glass* holds that New Jersey is the child's domicil. The case contains not the slightest intimation that if the New Jersey award had been to the wife, the holding would not have been that the child was domiciled in Massachusetts.

Yarborough v. Yarborough (1933), 290 U. S. 202, 78 L. ed. 269, 54 S. Ct. 181, 90 A. L. R. 924, cited in appel-

lant's argument in chief, involved the validity, as against the child, of a consent order made in a Georgia divorce case providing that the husband should place a lump sum in trust in full satisfaction of all future claims for the child's support. The child, whose custody was awarded to the wife, was not made a party, but, according to the law of Georgia, the right that the husband should support the child was not vested in the child, but in the wife (290 U. S. 210). As in *Glass v. Glass*, the husband, wife and child were all domiciled in the State when the case was brought, the husband and wife both appeared as active litigants, and the Georgia court's jurisdiction was as complete as it could become—short, at least, of joining the child as a party, which this Court held was unnecessary since the right to support was not the child's property. Unless, therefore, this Court intended to intimate *both* that a parent still retains the power, *after* he has submitted the matter of his child's custody to a competent court of the State of his child's domicil, to shift the child's domicil *out* of that State while the matter is *sub judice*, and also that, if the parent does so, he thereby successfully *divests* that court's vested jurisdiction, this Court's expression that wives in general do not have the power to change their children's domicil, occasioned by Mrs. Yarborough's moving with the child from Georgia to South Carolina during the Georgia case, would seem not to have been necessary to this Court's decision.

Wear v. Wear (1930), 130 Kan. 205, 285 P. 606, 72 A. L. R. 425, also previously cited by appellant, requires no comment save that it is scarcely an authority for appellee's position.

Lanning v. Gregory (1907), 100 Tex. 587, 99 S. W. 542, 10 L. R. A. n.s. 690, 123 Am. St. Rep. 809, as stated in appellant's brief, is now flatly overruled by *Wicks v.*

Cox (1948), 146 Tex. 489, 208 S. W. 2d 876, 4 A. L. R. 2d 1, which indicates that it is possibly overruled by earlier Texas cases also.

In re Francis (1947), 75 N. E. 2d 700, 49 Ohio Law Abs. 427, previously cited by the trial court, is a nisi prius decision by a Probate Court in an adoption case. In Ohio, the consent of each parent to an adoption is required by statute unless he has "willfully" failed properly to support the child for the two years before the petition for adoption is filed. In *In re Francis*, the father had not consented. After discussing for some pages a variety of interesting subjects, including the domicil of children, the court found that the failure of the father to support his child was *not* "wilful," that his consent thus *was* required by the statute, and that the petition for adoption must therefore be denied.

Thus, if we read the cases cited by appellee Anderson correctly, the passages he relies on, to the extent they have not been overruled, are dicta unnecessary to the decision.

Time has not let us, since we received appellee Anderson's brief, collect anything we can call a "mass of authority." But we have managed to bring together six cases, each of which, if we read it correctly, flatly holds that, where the parents have separate domicils—as was concededly true here—the child's domicil follows that of the parent with whom he is in fact living. The six cases are:

White v. White (1913), 77 N. H. 26, 86 A. 353.

Callahan v. Callahan (1944), 296 Ky. 444, 177 S. W. 2d 565, specifically approved in *Abbott v. Abbott* (1947), 304 Ky. 167, 200 S. W. 2d 283, of which headnote "3" in "S. W. 2d" reads, "Minor children's domicil follows that of their natural parent with whom they are living."

Oxley v. Oxley (1946), 81 App. D. C. 346, 159 F. 2d 10.

Boardman v. Boardman (1948), 135 Conn. 124, 62 A. 2d 521, 13 A. L. R. 2d 295.

Hanson v. Hanson (1948), 150

Neb. 337, 34 N. W. 2d 388. *Worden v. Worden* (1949), 148 Tex. 356, 224 S. W. 2d 187.

Thus, respecting the Federal law, we urge it to be that, where husband and wife have separate domicils, the domicil of a child of their marriage is that of the parent, be it the father or the mother, with whom the child is making his home in fact, on three grounds, to wit: *First*, § 1 of the 14th Amendment, from the point of view of whichever of its clauses it is approached, requires that the right of the parents to make a home for their children be equal. *Second*, any such doctrine as "unity" or "identity" of father and child is wholly unknown to our law and, therefore, the moment the "unity" of husband and wife is admitted to be broken to the extent necessary to let the wife have a home of her own, it is necessarily broken to the extent necessary to let her make that home her children's home also. *Third*, to the extent the decided cases speak clearly, this is their holding.

WHEREFORE: For each of the reasons appellant urges in her argument in chief, each of which reasons we urge stands wholly unanswered by appellee, appellant respectfully asks that the judgment of the Supreme Court of Ohio be reversed.

Respectfully submitted,

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